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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

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7 UNITED STATES OF AMERICA,
8 Plaintiff,
9 v.
10 BRIAN FLOYD,
11 Defendant.

Case No. 2:17-cr-00404-RFB-VCF

ORDER

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14 Defendant Brian Floyd moves the Court to vacate, set aside, or correct his sentence (ECF
15 No. 141) on the basis that aiding and abetting a Hobbs Act robbery does not qualify as a “crime of
16 violence” under 18 U.S.C. § 924(c). For the reasons below, his motion is denied.

17 **I. FACTUAL AND PROCEEDURAL BACKGROUND**

18 On May 4, 2018, Mr. Floyd pleaded guilty to aiding and abetting carjacking (Count 1),
19 aiding and abetting Hobbs Act robbery (Count 2), and aiding and abetting the brandishing of a
20 firearm during and in relation to a crime of violence, namely Count 2 (Count 3). ECF Nos. 89, 91,
21 92. On September 13, 2018, the Court sentenced Mr. Floyd to concurrent sentences of three
22 months’ imprisonment for Counts 1 and 2 and a consecutive sentence of seven years for Count 3.
23 ECF Nos. 118, 120. The Court also sentenced Mr. Floyd to supervised release for three years on
24 Counts 1 and 2 and five years on Count 3. ECF No. 120.

25 Following the Supreme Court’s decision in United States v. Davis, 139 S. Ct. 2319 (2019)
26 (holding the § 924(c) residual clause is unconstitutionally vague), on June 23, 2020, Mr. Floyd
27 timely filed a 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence relying on Davis.
28 ECF No. 141. The motion was fully briefed. ECF Nos. 153, 157. On September 16, 2020, the

1 United States filed a Motion for leave to file a sur-reply, which the Court granted on September
2 29, 2020. ECF Nos. 161, 165. Mr. Floyd Responded to the sur-reply on September 30, 2020. ECF
3 No. 169. On April 27, 2021, the United States filed a Motion for Leave to Advise the Court of new
4 authorities. ECF No. 170. On May 5, 2021, the Court granted the United States Motion for Leave
5 to Advise and set a hearing for the Motion to Vacate. ECF No. 177. Mr. Floyd Responded to the
6 United States' Motion for Leave to Advise on May 11, 2021. ECF No. 184. On May 19, 2021, the
7 Court vacated the hearing and deferred ruling on the Motion to Vacate. ECF No. 188.
8 Subsequently, both Mr. Floyd and the United States have kept the Court apprised of developments
9 in the caselaw post-Davis. ECF Nos. 193, 215, 219, 220, 221, 223, 226.

10 **II. LEGAL STANDARD**

11 Under 28 U.S.C. § 2255, a petitioner may file a motion requesting the court which imposed
12 sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a motion may be
13 brought on the following grounds: “(1) the sentence was imposed in violation of the Constitution
14 or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the
15 sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject
16 to collateral attack.” Id.; see United States v. Berry, 624 F.3d 1031, 1038 (9th Cir. 2010). When a
17 petitioner seeks relief pursuant to a right newly recognized by a decision of the United States
18 Supreme Court, a one-year statute of limitations applies. 28 U.S.C. § 2255(f)(3). That one-year
19 limitation begins to run from “the date on which the right asserted was initially recognized by the
20 Supreme Court.” Id.

21 **III. DISCUSSION**

22 The Court finds that there are no grounds to grant § 2255 relief.

23 Section 924(c), under which Mr. Floyd was convicted, prohibits the use of a firearm
24 “during and in relations to any crime of violence.” 18 U.S.C. § 924(c)(1)(A). Following the
25 Supreme Court’s ruling in Davis, a felony qualifies as a crime of violence only if it “has as an
26 element the use, attempted use, or threatened use of physical force against the person or property
27 of another.” 18 U.S.C. § 924(c)(3)(A); see also Davis, 139 S. Ct. 2319 (invalidating
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1 18 U.S.C. § 924(c)(3)(B)).

2 The Hobbs Act, under which Mr. Floyd was convicted and which also supports his
3 conviction under Count 3, criminalizes committing, attempting to commit, or conspiring to commit
4 a robbery with an interstate component. 18 U.S.C. § 1951(a). Mr. Floyd was convicted under an
5 aiding and abetting theory of criminal liability. Section 924(c) authorizes heightened sentences for
6 those who use a firearm in connection with a “crime of violence.” 18 U.S.C. § 924(c). Mr. Floyd
7 argues that, while Hobbs Act robbery is a crime of violence, he was convicted of aiding and
8 abetting, which should not be considered a crime of violence.

9 The door to this argument opened with the Supreme Court’s decision in United States v.
10 Davis, which presented the possibility that all or some forms of Hobbs Act robbery were not crimes
11 of violence under § 924(c). 139 S. Ct. 2319. Following Davis, only federal felonies that have as
12 an element the use, attempted use, or threatened use of force qualify for § 924(c).¹
13 18 U.S.C. § 924(c)(3)(A). In United States v. Taylor, the Supreme Court held that no element of
14 attempted Hobbs Act robbery required proof of the defendant’s use, attempted use, or threat to use
15 force. 142 S. Ct. 2015, 2020 (2022). Therefore, attempted Hobbs Act robbery was not a crime of
16 violence and § 924(c) does not apply. Id. at 2021.

17 However, the Supreme Court and the Ninth Circuit recently closed that door to § 2255
18 relief for those convicted of aiding and abetting Hobbs Act robbery. Following Taylor, the Ninth
19 Circuit has held that while attempted Hobbs Act robbery is not a crime of violence, completed
20 Hobbs Act robbery remains a crime of violence. United States v. Eckford, 77 F.4th 1228 (9th Cir.
21 2023). Further, in Eckford, the Ninth Circuit also held that aiding and abetting a Hobbs Act robbery
22 is a crime of violence. 77 F.4th at 1237. “One who aids and abets the commission of a violent
23 offense has been convicted of the same elements as one who was convicted as a principal”
24 Id. Therefore, aiding and abetting Hobbs Act robbery, like completed Hobbs Act robbery, is a
25 crime of violence within the meaning of § 924(c). Id.; see also Young v. United States, 22 F.4th

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27 ¹ Prior to Davis, it was settled law in this circuit that Hobbs Act robbery was a crime of
28 violence under a different provision of § 924(c). See United States v. Mendez, 992 F.2d 1488,
1491 (9th Cir. 1993) (holding that Hobbs Act robbery was a crime of violence under the residual
clause); Davis, 139 S. Ct. at 2336 (invalidating the residual clause).

1 1115, 1122-23 (9th Cir. 2022) (“We therefore hold that, because armed bank robbery is
2 categorically a crime of violence, a person who aids or abets armed bank robbery falls, like a
3 principal, within the scope of the definition of the underlying offense and is deemed to have
4 committed a crime of violence under § 924(c)’s elements clause.”).

5 Since aiding and abetting Hobbs Act robbery is a crime of violence, Mr. Floyd’s conviction
6 under § 924(c) is sound.

7 8 **IV. CERTIFICATE OF APPEALABILITY**

9 This is a final order adverse to the Petitioner Mr. Floyd. As such, Rule 11(a) of the Rules
10 Governing Section 2255 Cases requires this Court to issue or deny a certificate of appealability
11 (COA). See also 28 U.S.C. § 2253(c)(1)(B). Without a COA, Mr. Floyd “may not appeal that
12 denial.” United States v. Washington, 653 F.3d 1057, 1059 (9th Cir. 2011). To issue a COA, the
13 Court must find that Mr. Floyd “has made a substantial showing of the denial of a constitutional
14 right.” 28 U.S.C. § 2253(c)(2). Under this standard, the Court looks for a showing that “reasonable
15 jurists would find [this Court’s] assessment of the constitutional claims debatable or wrong.” Slack
16 v. McDaniel, 529 U.S. 473, 484 (2000). Because the Court found that settled, binding caselaw
17 disposes of Mr. Floyd’s claims, the Court finds that no reasonable jurist could find the Court’s
18 assessment debatable or wrong.

19 **V. CONCLUSION**

20 **IT IS THEREFORE ORDERED** that Defendant Brian Floyd’s Motion to Vacate, Set
21 Aside, or Correct Sentence under 28 U.S.C. 2255 (ECF No. 141) is **DENIED**.

22 **IT IS FURTHER ORDERED** that Defendant Brian Floyd is **DENIED** a Certificate of
23 Appealability.

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2 **IT IS FURTHER ORDERED** that the United States' Motion to Advise the Court (ECF
3 No. 221) is **GRANTED**.

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5 **DATED** this 4th day of December 2023.

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE